BRIEF OF APPELLEE

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

No. 22322

MILDRED J. JACOBSON, BASIL D. JACOBSON, by MILDRED J. JACOBSON, his next friend, and PRISCILLA J. JACOBSON, by MILDRED J. JACOBSON, her next friend,

Appellants

vs.

COLORADO FUEL AND IRON CORPORATION, a corporation,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

Cresap S. McCracken
Douglas C. Allen
Great Falls National Bank Building
Great Falls, Montana

Attorneys for Appellants

Emmett C. Angland
Joseph R. Marra
Great Falls National Bank Building
Great Falls, Montana

Attorneys for Appellee

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INTRODUCTORY STATEMENT

This is a wrongful death suit allegedly based upon the law of products liability. Plaintiff asserted liability in negligence, express warranty, implied warranty and strict liability.

The Defendant, CF&I, manufactured and sold a steel strand designated as 270K grade to the decedent's employer, United Prestress, Inc., which used the strand in the manufacture of prestressed concrete members. On October 1, 1964, United Prestress, Inc., was fabricating two 90 foot T-beams in a prestressed concrete bed. There were 22 strands, more than 180 feet long, stretched and pretensioned horizontally at various heights across the bed. These were to be pulled down in a jacking device and held down at each of four "hold-down" points by a single piece of the same strand about seven feet in length. One of these short pieces of strand used at one of the "hold-down" points broke while it was being used to pull down the pretensioned horizontal strands causing the horizontal strands to be released like 22 great bow strings which in oscillating caused injuries resulting in the death of the plaintiff's decedent.

ARGUMENT

The Plaintiff asserted, but did not prove, that the strand was defective, and as a matter of fact, the

only proof is that the strand was not defective.

Stephen Teleshak, the Metallurgical Engineer, Manager of the Metallurgical Department of the Pittsburgh Testing Laboratory (T.300), an independent testing laboratory (T. 408), who examined and tested the strand that broke, and a strand from the same reel (T. 348, 349, 350), testified that he had "no doubts whatsoever" that the strand was not defective (T. 407) and that the strand that broke met and exceeded the Minimum Ultimate Strength Specifications of 31,000 pounds (T. 324, 325, 326) as represented in defendant's bulletin (P's Ex. 1).

Plaintiff's expert Dr. Arthur A. Anderson, admitted that he could not state that the strand which broke had a minimum ultimate strength of less than 31,000 pounds (T.168) or that the strand was defective (T. 172). The record clearly shows that any one or more factors in combination could have caused the strand to break.

Plaintiff's expert admitted that he probably would not have used only one hold-down strand (T. 160, L. 13-17). Plaintiff's witness, Albert Young, an Architectural Engineer in charge of United Prestress's prestressing operation (T. 6, L. 4-6), testified that in this instance he would have used two hold-down strands (T. 37, L. 18-21); that he recommends that 18,000 pounds theoretical tension not be exceeded (T. 38); that on this particular

day the theoretical tension exceeded the tension he would recommend for one hold-down strand (T. 38, L. 9-19).

Plaintiff's witness, Harry Knight, Plant Superintendent at United Prestress, testified that the shop drawings usually contain the number of pounds of tension to be put on the hold-downs but that the shop drawings on this day did not contain the number (T.119, L. 23-25; T. 120, L. 5-20). It is clear that the workmen engaged in the actual fabrication of the concrete members, from Mr. Knight on down, worked from plans furnished them by the technicians, (T. 210, 212, 214, 216, 225, 226, 227, 91, 92, 119, 120) and that since the workmen proceeded with the fabrication of the concrete member despite the absence of such information, tension on the hold-down strand was a factor which was simply not taken into consideration on the day of Mr. Jacobson's death.

H. Kent Preston, whose deposition plaintiff introduced in evidence as Exhibit 11 (T. 269), Civil Engineer, (P's Ex. 11, Pg. 8, L. 14-15) under whose supervision this particular strand was developed, testified that it is standard procedure to use a safety factor of two and that the tension in the strand when used as a hold-down should not exceed 50% of its ultimate strength (P's Ex. 11, Pg. 21, L. 13-23).

Jack Janney, the Independent Consulting Structural Engineer, and an expert in prestressed concrete (T. 409,

410), testified that a knowledgeable engineer would not use one hold-down strand in a hold-down device such as the one used here (T. 425, L. 16-20) and he also stated he would recommend at least a safety factor of two (T. 425, L. 21-25; T. 426, L. 1-9), and that under the circumstances here, the safety factor per se was less than one (T. 454, L. 5-13).

All of the experts and professional witnesses, therefore, whether they testified on behalf of the plaintiff or the defendant, stated that they would not have used a single hold-down strand in the device which was used on October 1, 1964.

Albert Young, Chief Technician and Engineer at United Prestress, Inc. (T. 29, 30), testified that he had instructed Harry Knight, the Plant Superintendent, to deflect in increments (T. 31, L. 13-16) to reduce the friction (T. 32, L. 10-17). Harry Knight admitted that each of the beams were deflected all the way on this particular day (T. 121, L. 9-17) in violation of those instructions.

Arthur Deshner, Mr. Jacobson's co-worker, admitted that after the accident they did deflect in increments (T. 233, L. 20-21), but that before the accident they didn't. He admitted that now they are deflecting all the way as they did before Jacobson's death (T. 234, L.

1-3) because it is easier (T. 234, L. 14-22) and the accident is no longer so fresh in his mind (T. 235, L. 18-23).

Albert Young testified that it is proper to use the gauges on the hydraulic pumps to "double check" the force at each hold-down point to determine whether the stress is proper or exceeds the calculated stress (T. 35, L. 13-21). Harry Knight testified that there were gauges on the hydraulic pumps that day but he did not believe they were being used (T. 118, L. 22-25; T. 119, L. 1).

Arthur Deshner testified he didn't remember whether there were any pressure gauges or not but he did know that they didn't use them (T. 233, L. 4-8). The evidence is clear that no one was concerned with the tension on the hold-down strands that day.

Stephen Teleshak testified that misalignment, eccentricity and non-uniform loading can cause premature failure (T. 315, 316), because if the strand is not perfectly plumb in the chucks the load may be translated on one or two wires rather than uniformly (T. 317).

Jack Janney illustrated the effect of this differential grip bite with the notched paper illustration, showing that if the non-notched side is gripped, the paper is strong, but if the notched side is gripped, it is very weak and tears easily (T. 467). Jack Janney also

testified that this type of a hold-down device is well-known to reduce the breaking strength of the strand by a considerable amount because it is necessary that everything be lined up carefully (T. 419, L. 21-25; T. 420, L. 1-8). Albert Young testified that it would be impossible to have perfect alignment in this particular jacking device (T. 48, L. 25; T. 49, L. 1-4).

Harry Knight testified that the strand is not plumb in this device (T. 114, L. 21-25; T. 115, L. 1-17). H. Kent Preston testified that misalignment causes a great reduction in the efficiency of the strand (P's Ex. 11, Pg. 16, L. 25; Pg. 17, L. 1-3). Even Doctor Anderson finally admitted that there was correlation between misalignment and breaking strength, (T. 179, L. 7-15); and that the teeth in the chucks bite into the strand like pliers (T. 175, L. 5-13).

Doctor Anderson also testified that anyone with a technical backround such as the man who designed this system, would know that you couldn't expect to develop the ultimate strength of the strand in a Supreme Chuck (T. 165, L. 23-25; T. 166, L. 1-14).

Jack Janney also testified it certainly should be common knowledge for an engineer to know that you couldn't develop 31,000 pounds minimum ultimate strength in a strand chuck (T. 424) Doctor Anderson also testified

that a variety of factors could influence the strength of the strand as contrasted with its ultimate strength such as foreign matter between the inner surface and the outer surface, the degree of lubrication and the eccentricity of the pull. (T. 187, L. 4-23). Impact force, if the strand is loaded rapidly, can drastically reduce the strength of the strand (T. 463, L. 14-20), and the testimony is that there was a jump or sudden movement and then another movement like it. (T. 244, L. 17-25).

The manufacturers of the Supreme Chucks also published charts (P's Ex. 3) which were tacked around the shop for the men to see (T. 41, L. 13-24), which charts warned that it is "imperative" not to hammer or nick the chucks (T. 44, L. 17-20). It is clear that Etzweiler, another workman, was hammering this chuck with a home-made fork hammer made out of rod-iron (T. 245, L. 13-21). He testified that now "after Jake died", they've stopped using it. (T. 237, L. 13-23). The same literature instructs that the chucks should be properly lubricated (T. 46, L. 5-17). Doctor Anderson testified that this was one of the factors which could influence the strength of the strand as contrasted with its ultimate strength (T. 187, L. 4-25) and yet there is no evidence that the chucks were lubricated or with what they were lubricated at United Prestress on the day of Mr. Jacobson's

death.

The literature also agrees with the experts testimony, and cautions to be sure that the strand is pulled in a straight line (T. 48, L. 3-11). It is clear therefore, that the trial court's Finding of Fact number VII that there is "no evidence" of "manufacturing defects" and Finding of Fact XI that "in the light of all of the possible combinations of factors which might have caused the hold-down strands to fail" the "plaintiffs have not met the burden of proving that the strand was defective or negligently manufactured" are supported by the evidence.

The plaintiffs are now contending that the defendant's bulletin (P's Ex. 1) represented to Mr. Floyd Swenson, the engineer who designed the T-beam, that its strand can bear a load of 31,000 pounds under any and all circumstances or uses.

Defendant's bulletin states that its strand will develop "a percentage of its ultimate strength" comparable to that of ASTM grade in a casting bed. It further states under the heading SPECIFICATIONS that "type 270K strand shall be fabricated and tested in accordance with the requirements of ASTM A416-59T". The defendant thus represented that type 270K grade strand has a Minimum Ultimate Strength of 31,000 pounds under

the described testing methods.

An examination of the bulletin itself discloses that it was prepared for technically informed people in the prestressed concrete industry. As H. Kent Preston testified, the strand is ordered through the catalog (bulletin) provided by the defendant, which contains the specifications and the strand must conform to those specifications (Ex. 11, Pg. 11, L. 13-25; Pg. 12, L. 1-6). Albert Young testified that he used the bulletin to buy the strand because it comes up to certain specifications which are common knowledge in the industry (T. 60, L. 6-25; T. 61, L. 1). Floyd Swenson has a Master's Degree in Engineering, (T. 62) and testified that he used the bulletin and understood what ASTM grade meant (T. 80, L. 8-22). He testified:

> Q. Now, there was handed to you a moment ago Plaintiff's Exhibit 1 which is entitled "CF&I Roebling Type 270K Prestressed Concrete Strand Specifications and Physical Properties. Is that right?"
>
> A. Yes, sir.
>
> Q. That refers, does it not, to ASTM grade strand, is that correct?--does that mean something to you?
>
> A. It sure does.

Both Doctor Anderson and Jack Janney, Plaintiff's and defendant's experts respectively, testified that it is common knowledge to an engineer that 31,000 pounds

load cannot be developed in a Supreme Chuck (T. 166, 424, L. 9-15; 425, L. 16-20; 464, L. 22-25; T. 465, L. 1-2). Teleshak, the Metallurgist, produced a copy of the ASTM specifications A416 from which he testified (T. 327), to which specifications the bulletin repeatedly refers, and Teleshak testified that ASTM tests are conducted with "fitted slip limiting grips" (T. 334, L. 7-12), and not with Supreme Chucks or wedge grips of the type used in a prestressed concrete bed. Not one of the witnesses testified, including Mr. Swenson, that they expected the strand to develop its Minimum Ultimate Strength of 31,000 pounds in a prestressed concrete bed. It is clear from the evidence that those who used the bulletin understood what ASTM meant and what Minimum Ultimate Strength under ASTM A416 meant.

The term Minimum Ultimate Strength simply means the minimum number of pounds at which the strand will break in the absence of mechanical damage (T. 167, 168, 313, 333, 334, 335, 423, 424). As a matter of fact, if, during a test to determine the breaking strength of a piece of strand, the strand should fail in the gripping device of the testing apparatus, the test would be unsuccessful (T. 167, 168, 313) because it might have broken as the result of mechanical damage caused by the gripping device.

Ideally, a breaking strength test would result in a series of tensile breaks in the individual 7 wires of which the strand is composed as distinguished from sheer type fractures, the latter resulting from mechanical damage to the strand (see figure 6, P's Ex. 5).

The above described testing procedure was formulated by the American Society for Testing and Materials (T. 80), and an understanding of the test to determine breaking strength or minimum breaking strength would necessarily carry with it an understanding that the concept excludes the possibility of mechanical damage (T. 333, 334, 335, 336). Mr. Albert Young and Mr. Floyd Swenson, the two engineers and technical personnel working at United Prestress, Inc., at the time of the accident, understood the testing procedures utilized in measuring the specifications and physical properties of the strand (T. 60, 80). Young testified that the meaning of the information contained in Plaintiff Ex. 1 (the bulletin) is a matter of "common knowledge***in the industry" (T. 60). The bulletin which outlines the "SPECIFICATIONS AND PHYSICAL PROPERTIES" of the strand, is, by its very terms, addressed to technicians who understand the concepts employed in describing the product and measuring the qualities (T. 464, 465). The cause of the failure of the strand employed in the

particular hold-down device used that day was mechanical damage, caused, in whole or in part, by the gripping action of the Supreme Chucks used in the hold-down device (T. 305, L. 23-25; T. 306, L. 1-4; T. 307, L. 17-25; T. 308, L. 1; T. 309, 310, 311, 312, 313), as well as all or some of the other possible combinations of factors heretofore referred to. It is a matter of common knowledge among technicians in the prestressed concrete industry, to whom defendant's bulletin was addressed, that it is not possible to develop the full strength of a piece of strand by employing gripping devices such as Supreme Chucks because of the effect of mechanical damage (T. 165, L. 23-25; T. 166, L. 1-14; T. 419, 424).

Plaintiff's brief, P. 33, 43, states that the defendant, through its agents, knew the manner in which its strand was used at United Prestress having observed the hold-down techniques. Albert Young testified that he knew that the defendant's salesmen weren't engineers capable of giving advice (T. 61), and as a matter of fact, testified, when asked by the attorney for the plaintiff whether the safety factor employed by him had ever been suggested by CF&I replied:

> "I would say that this would be beyond their scope to suggest this and I am sure that it wasn't suggested by them." (T.201).

Floyd Swenson testified he didn't know whether

they were engineers or not (T. 84, L. 10-18). Further, there isn't any evidence that any of these salesmen knew how many hold-down strands were being used on the job that day and Swenson testified that it was the first member that he had ever designed "exactly" like this one (T. 80, L. 4-7), so that the salesmen, even if they had been technically qualified, never had the opportunity to advise.

Another contention made by the plaintiff is that the bulletin should have warned of the limitations when the strand was used as a hold-down strand. Swenson testified that the strand could be used for many configurations (T. 85, L. 4-5); Preston testified (Ex. 11, Pg. 14, L. 17-25; Pg. 15, L. 1-2) that there are many types of hold-down devices employed by various operators of prestressed concrete plants and defendant could hardly be expected to anticipate all of the possible types of uses to which the strand might be put. The defendant, therefore, did the only thing it could reasonably do in its bulletin. It gave the specifications and the physical properties of the strand and the ASTM designation so that the engineers who bought and used the strand would know the testing methods employed and what they were dealing with.

The trial court's finding that the persons required to have knowledge of the stress generated in the operations, the adequacy of the design of the casting bed and the hold-down devices were the technicians, is supported by the evidence.

The evidence established unequivocally that the workmen engaged in the actual fabrication of the concrete members, from Mr. Knight on down, are concerned only with distances and work from plans furnished to them by the technicians (T. 210, 212, 214, 216, 225, 226, 227, 91, 92, 119, 120).

The trial court's finding of fact that:

> "On at least three prior occasions, and perhaps more, United Prestress had failures of hold-down devices. An engineers named Swenson, designed the T's which were being made, but he did not design the hold-down device, and there is no evidence as to his knowledge of the adequacy of the hold-down devices which used one strand of 270K. Young, superintendent of the plant and the chief technician, knew that two strands, or a strand larger than 7/16 inch should have been used in the operation in question and that one strand should not be used where the tension exceeded 18,000 pounds. From the testimony the court is of the opinion that Young had this knowledge prior to the accident..."

is supported by substantial evidence.

The evidence established the existence of a number of hold-down strand failures prior to the accident

(T. 42, 229). That finding of fact is uncontroverted.

The court's Finding of Fact that Mr. Swenson did not design the hold-down device is uncontroverted (T. 83, L. 13-15).

The court's finding that there is no evidence as to his knowledge of the adequacy of this particular hold-down device is supported by the evidence because Mr. Swenson merely testified that he was familiar with the hold-down device (T. 83) and there is no evidence that he either directed the use of one single 7/16 inch strand in the hold-down device or that he was aware that a single strand hold-down device was to be used at each hold-down point. Indeed, the evidence demonstrates that Mr. Swenson did nothing more than prepare the design calculations. He did not even prepare the shop drawings which were drawn by a third party named Ron Nybo, which drawings on this day didn't contain the pounds pressure at the hold-down point as they usually did (T. 85, L. 23-25; T. 86, L. 1; T. 119, L. 23-25; T. 120 L. 1-20). This point is significant, because, as Mr. Young's testimony indicates, the design of the hold-down device was not faulty. On the contrary, an adequate margin of safety can be provided for by the use of a larger strand in the hold-down device or by the use of two strands and two devices at each hold-down point (T. 37). Thus, Mr.

Swenson's familiarity with the nature of the hold-down device, in addition to his knowledge of the theoretical tension to which the hold-down device was subjected, does not constitute evidence as to the adequacy of the hold-down methods employed on the day in question.

The finding of the trial court that Mr. Young was the superintendent of the plant and the chief technician at the time of the accident is supported by substantial evidence, despite Appellant's assertions to the contrary.

Mr. Young testified that at the time of the accident he was "Production Coordinator" and that his duties included sales and engineering (T. 5, L. 19-25). Although his testimony that he was chief technician and engineer may have related to the time of the trial (T. 29, L. 23-25; T. 30, L. 1-25; T. 31, L. 1-2), he testified that at the time of the accident he was superior to Mr. Knight, the plant superintendent, that he gave instructions to Mr. Knight; that he had discussed deflecting procedures with Mr. Knight prior to the accident; that he had advised the men with respect to safety around the United Prestress plant; that he had been employed by United Prestress for as long as it had been in existence (approximately four years) and had been employed by its predecessor Pappin Prestress Concrete

(T. 5). Mr. Swenson on the other hand, had bee employed by United Prestress only from November of 1963 and no evidence was introduced to the effect that he acted in a supervisory capacity over the men.

The trial court's conclusion that the Appellant's failed to sustain the burden of proof with respect to the "duty to warn theory" is correct.

The trial court's conclusions of law are based upon the obvious fact that liability cannot be predicated upon a failure to tell a person something he already knows, Anno., 76 A.L.R. 2d 9 at 28 (1961); Restatement, Torts 2d, Section 338(b); and, hence, where the use of a product is to be directed by technicians having knowledge of the characteristics of the product, liability cannot be based upon the failure to warn of dangers, knowledge of which necessarily results from a knowledge of the nature and characteristics of the product. Hopkins v. E. I. DuPont DeNemours & Company, 212 F.2d 623 (3rd Cir. 1954); Marker v. Universal Oil Products Co., 250 F.2d 603 (10th Cir. 1957); Parker v. State, 105 N.Y.S. 2d 735 (Ct. Cl. N.Y. 1951); Harper v. Remington Arms Co., 280 NY.S. 862 (Sup. Ct. 1935); Rosebrock v. General Electric Company, 140 N.E. 571 (N.Y. 1923); See also Johnson v. Buckley, 317 F.2d 644 (5th Cir. 1963). For example, in Parker v. State, supra, which was a wrongful

death suit against the State of New York, which had sold blood plasma to a hospital which, in turn, had administered it to a patient who died from jaundice, the court stated:

> "It is also urged that the State was remiss in failing to affix a warning label to the plasma carton. There is no warrant for the assumption that the State had an obligation to instruct licensed physicians in the proper application of therapeutic agents in common use....
>
> . . .
>
> "In this case the product distributed was designed for use by physicians. There is a manifest distinction between selling a medical preparation to the public, who may have no knowledge of the dangers attendant upon its use, and making available a preparation to a hospital at its request, whose physicians may be expected to have knowledge of the dangers involved in utilizing the therapeutic preparation ordered by them. Ordinarily, there is no duty to give warning to the members of a profession against generally known risks. 'There need be no warning to one in a particular trade or profession against a danger generally known to that trade or profession.'" 105 N.Y.S. 2d at 740, 741.

In Harper v. Remington Arms Co., supra, the defendant manufactured special high velocity shotgun shells designed for the sole purpose of testing weapons, and the plaintiff was given a box of those shells by a friend. The friend, in turn, had received the shells from an unnamed third party and no evidence was presented as to where the third party had obtained them. In his suit

against the defendant, the plaintiff alleged the warning on the box of shells was inadequate. In answer to that contention, the court used the following language:

> "The use of the words 'proof load' and 'Remington Proof Load 7.5 Tons pressure' on the shells and the printing on the label affixed to the top of the cover of the box in the case at bar would unquestionably be sufficient notice to arms manufacturers and dealers in shells for arms manufacturers of the danger and character of the shells. Undoubtedly, to such class of persons nothing further need have been done by the defendant. To them sufficient notice was given, and the active force or risk created by the defendant having come to rest in a position of apparent safety, the court will follow it no longer." 280 N.Y.S. at 868.

Again, in Rosebrock v. General Electric Co., supra, where an issue presented was the question of a manufacturer's duty to warn, the New York Court of Appeals stated:

> "...I take it that an instrument which may be dangerous and is generally known to the electrical profession as a danger need not be warned against by a seller. If, for instance, transformers were usually packed with wood as were these, and the electrical trade or experts should have known that such packing was usual and that danger would arise unless the instrument was examined and packing removed, then in such case the General Electric Company would not be negligent in shipping to electric companys or experts the transformers without any instruction or caution..." 140 N.E. at 574.

Finally, in Marker v. Universal Oil Products Co., supra, another wrongful death suit where the question of duty to warn was presented, the court disposed of the issue as follows:

> "We pass now to appellant's second claim: That Universal had a duty to warn decedent of the danger of entering the vessel when hot catalyst was in use.
>
> "The fact that the use of hot catalyst in the vessel during the process of recharging would create carbon monoxide gas and hence a dangerous condition for workmen lowered into the vessel was equally within the technical knowledge of both Universal and Tidewater. No duty existed upon Universal to warn Tidewater of such a potentiality..." 250 F.2d at 606.

In the instant case, the evidence demonstrates conclusively that the appellee's strand measured up to and exceeded the specifications and physical properties set forth in the appellee's brochure. Mr. Swenson and Mr. Young, the engineers and technical personnel at the United Prestress Plant, were familiar with the appellee's literature and understood fully the scientific concepts employed in describing the material; and therefore were familiar with the fact the actual breaking strength of a piece of strand is a variable factor under field conditions, depending upon various factors creating external stress, such as bending and the gripping action of the chucks, which result in mechanical damage. The expert

witnesses called by both the appellants and the appellee affirmed that this fact was a matter of common knowledge in the prestress concrete industry. The evidence established further that responsibility for design and employment of the hold-down device was reposed, and because of the nature of the industry was necessarily reposed, in the engineers at United Prestress.

The trial court found that Mr. Young was the superintendent of the plant and the chief technician and, as stated above, that finding is supported by substantial evidence. He testified that it was his engineering practice not to exceed a theoretical hold-down tension of 18,000 pounds when using a single 7/16 inch strand on the hold-down device. If we assume, as do the appellant's, that under the United Prestress operation, responsibility for the hold-down device rested with Mr. Swenson, the result would still be the same; the evidence proved that Mr. Swenson likewise possessed the requisite technical knowledge to understand the effect of mechanical damage to the strand, and, hence, the necessity of a safety factor to protect the men.

The trial court, citing Hopkins v. E. I. DuPont DeNemours & Co., supra, held the appellant's had failed to sustain their burden of proving an absence of knowledge on the part of the United Prestress technicians

of the characteristics of the product which necessitated a built-in margin for safety. As the circuit court stated in the DuPont case:

> "...the issue of the user's ignorance of danger was one on which plaintiff had the burden of proof." 212 F.2d 623 at 626.

In this case, whether the burden of proof on the issue of lack of knowledge be regarded as residing in the plaintiff at the outset, or with the defendant, the trial court's finding is correct. The defendant, through the testimony of Doctor Anderson, Mr. Janney, Mr. Young, and Mr. Preston (in his deposition), came forward with the evidence and proved that it is a matter of common knowledge that mechanical damage is the necessary result of the use of strand in a hold-down device such as the one employed in the instant case, and the evidence shows that Mr. Swenson was a graduate engineer with a Masters Degree. Either expressly or by necessary implication each of those witnesses testified that a substantial margin of safety to protect the men was employed by them because of their knowledge of the product and its characteristics. On the other hand, the appellants produced no evidence as to the specific knowledge of Mr. Swenson as to the necessity of an adequate safety factor. In view of the fact Mr. Swenson was aware of

the specifications and physical properties of the product, the conclusion is inescapable that, as a graduate engineer, he was necessarily aware of the need for a margin of safety. Assuming Mr. Swenson, and not Mr. Young, were responsible for the hold-down device with respect to the single T-members in question, the fact Mr. Swenson failed to discharge his responsibility is irrelevant to the question of his knowledge.

In short, the evidence demonstrated that (1) the prestressed concrete industry is a technical field; (2) that, although the fabrication of members is dangerous if done improperly, responsibility for avoiding the dangers rests with design engineers and technicians; (3) that a knowledge of the specifications and physical properties of a particular piece of strand is all that an engineer needs to build a margin of safety into his design; and (4) that Mr. Young and Mr. Swenson were made aware, through the appellee's literature, of the specifications and physical properties of the 270K strand in question. Under these circumstances, it is obvious the appellants have failed to sustain their burden of proving Mr. Jacobson's death was the proximate result of negligence on the part of the appellee.

The fact that Mr. Young, or Mr. Swenson, failed to exercise their responsibilities with respect to the

hold-down device in question obviously does not render the appellee a joint tort feasor, as the appellants suggest. As appellants state on page 36 of their brief, the proximate cause of an injury is defined in Montana as:

> "That cause which in a natural and continuous sequence, unbroken by any new and independent cause, produces the injury, and without which it would not have occurred." McNair v. Berger, 92 Mont. 441, 15 P.2d 834 (1932) (emphasis added)

See also Restatement, Torts 2d Section 432. In the present case the appellants' contention is that the appellee was negligent in failing to impart certain information concerning its product, and the evidence demonstrates that the only persons to whom such information would be meaningful already possessed the relevant knowledge. The failure to tell someone something he already knows obviously cannot be the proximate cause of damages resulting from the failure of that person to employ the knowledge he possesses.

Appellee is not liable on the theory of breach of an express or implied warranty or upon the theory of strict liability in tort.

What has been said above disposes of the appellants contentions relative to whether appellee is liable on the theory of breach of an express or implied

warranty. The appellee's literature setting forth the specifications and physical properties of the strand was addressed to technicians having the scientific knowledge requisite to an understanding of the concepts employed in describing the material. As Mr. Teleshak testified, the strand did, in fact, measure up to those specifications and thus it is not possible to charge the appellee with the breach of any warranty which might be attributable to the appellee's literature. Furthermore, no privity of contract existed between the appellee and Mr. Jacobson or his family, and since the Montana Supreme Court has not passed upon the question of whether privity is essential to the existence of a warranty, it is submitted the traditional view, that privity is essential, must be deemed the law of Montana. Larson v. U.S. Rubber, 163 F. Supp. 327 (D. Mont. 1958)., so holds.

With respect to the question of strict liability, as the authority cited by the appellants on page 69 of their brief demonstrates, the theory is applicable only when the product is defective. In this case, of course, the plaintiffs have failed to show that the appellee's product was defective.

The denial by the trial court of the appellants motion for a new trial was not an abuse of discretion.

Concerning the appellants' motion for new trial, which was supported by affidavits, it should be noted at the outset that affidavits are relevant only when the motion is based upon matters outside the record. The only extra-record pigeonhole into which the appellants motion might fit would be newly discovered evidence, since there is no indication of any other extrinsic circumstance such as bribery of witnesses, jury misconduct, or fraud.

With respect to a motion for a new trial on the ground of newly discovered evidence, it is settled that:

> "...To warrant a new trial the evidence must not have been known to the movant at the time of the trial; and, moreover, the movant must have been excusably ignorant of the facts, i.e., the evidence must be such that it was not discoverable by diligent search. A party who has failed to evaluate evidence properly and thereby failed to submit it at the trial, or a party who desires to present his case under a different theory in which facts available at the original trial now first become important, will not be granted a new trial."
> 6A Moore's Federal Practice, Sec. 59.08 (3), p. 3785, 3786.

Thus, it is clear the appellants did not show themselves entitled to a new trial on the ground of newly discovered evidence.

The appellants protestations they were misled

as to the issues cannot be taken seriously in view, among other things, of the trial court's order filed April 12, 1966 which reads, in part, as follows:

> "Apart from any warranty problem, does the complaint state a cause of action in negligence? If a manufacturer makes a product knowing its use, knowing that it will be put to that use by employees of a buyer, knowing that a misuse would be dangerous, may the manufacturer be liable if he misrepresents the safe limit of use and the employee relies upon that representation? The negligence here might be in the use of the words rather than the manufacture of the cable." (R. p. 45)

And it is clear the appellants addressed themselves to that issue in their post-trial brief (R. p. 126-131); accordingly, their assertion they were taken by surprise when the trial court applied the principles of Section 388 of the Restatement of Torts 2d and Hopkins v. E. I. DuPont DeNemours & Co., supra, to the facts of this case is transparent.

The only question, therefore, is whether, based upon the existing record, the trial court's findings of fact and conclusions of law were "clearly erroneous" (Rule 52(a), Federal Rules of Civil Procedure), and for reasons set forth above, they were not.

CONCLUSION

The trial court's Findings of Fact and Conclusions of Law are supported by the evidence. There is no evidence that the strand was defective. The strand might have failed as the result of numerous factors. The plaintiffs failed to prove the proximate cause of the breaking of the strand. The defendant did not warrant or represent that the strand would withstand a tension of 31,000 pounds when used in a hold-down device such as was employed in this case.

The evidence conclusively established that the responsibility for the design and the use of the hold-down device, which employed the strand, was reposed, and was necessarily reposed, in the United Prestress engineers.

The evidence established that the United Prestress engineers were, through the defendant's literature, acquainted with the specifications and physical properties of the strand, and such knowledge to an engineer necessarily carries with it an understanding of the factors which can cause a strand to fail and of the need for a margin of safety.

The defendant's literature, was, by its terms, addressed to engineers and technically qualified personnel and, because of the nature of the industry, they were

the only persons to whom such literature would be meaningful. Accordingly, the trial court's conclusion that the plaintiff's failed to sustain their burden of proof with respect to the defendant's alleged negligent failure to warn is undeniably correct; "there need be no warning to one in a particular trade or profession against a danger generally known to that trade or profession".

The trial court properly denied the plaintiffs motion to amend its Findings of Fact and Conclusions of Law because the trial court's findings are amply supported by the evidence and the plaintiffs did not show themselves entitled to a new trial on the ground of newly discovered evidence.

Respectfully submitted this 8th day of February, 1968.

EMMETT C. ANGLAND
JOSEPH R. MARRA
529 Great Falls National
Bank Building
Great Falls, Montana 59401

BY Joseph R. Marra
Attorneys for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Joseph R. Marra
Attorney

CERTIFICATE OF SERVICE

I certify that on this 8th day of February, 1968, I served three (3) copies of the within and foregoing brief of Appellee upon Cresap S. McCracken and Douglas C. Allen, Attorneys for Mildred J. Jacobson, Basil D. Jacobson, by Mildred J. Jacobson, his next friend, and Priscilla J. Jacobson, by Mildred J. Jacobson, her next friend, Appellants, by delivering them to them personally at their offices in Great Falls, Montana.

Joseph R. Marra
JOSEPH R. MARRA
One of the Attorneys for
Appellee
529 Great Falls National
Bank Building
Great Falls, Montana 59401

REPLY BRIEF OF APPELLANTS

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

NO. 22322

MILDRED J. JACOBSON, BASIL D. JACOBSON, by MILDRED J. JACOBSON, his next friend, and PRISCILLA J. JACOBSON, by MILDRED J. JACOBSON, her next friend,

Appellants,

vs.

COLORADO FUEL AND IRON CORPORATION, a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

Cresap S. McCracken,
Douglas C. Allen
Great Falls National Bank Building
Great Falls, Montana

Attorneys for Appellants.

Joseph R. Marra
Great Falls National
Bank Building
Great Falls, Montana

Attorney for Appellee.

SUBJECT INDEX

TABLE OF AUTHORITIES

ARGUMENT

C.F.& I.'s answer brief is more significant for its omissions than for its content. Comparison of that brief against the subject index of the Jacobsons' opening brief quickly reveals that C.F.& I. has, in the main, not taken issue with the matters advanced by the Jacobsons, any of which should compel reversal of the decision of the trial court. For instance, C.F.& I. has disregarded the questions of liability for its negligent misrepresentations, for its failure, found by the trial court, to give warning of the limitations of its 270 K strand, and it has totally disregarded its breach of the express warranty stated in its literature, 31,000 pound "Breaking Strength of Strand", confining discussion to other portions of its literature.

No effort has been made by C.F.& I. to avoid the fact that its 31,000 pound strand failed under a load which did not exceed 23,250 pounds (Tr. 147-152), or 25,250 pounds according to its expert. (Tr. 440.)

C.F.& I. has tacitly admitted that the trial court relied upon the knowledge of the wrong man, to "insulate" it from liability for its negligence. C.F.& I. has also failed to come to grips with, or even mention, the trial court's Finding XIV (R.A. 231) and the controlling Montana cases of Hopkins vs Ravalli County Electric Co-op., Inc., 144 Mont. 161; 395 P.2d 106 (1964) and Lake vs Emigh, 121 Mont. 87, 190 P. 2d 550 (1948). These cases applied to the trial court's finding XIV compel entry of judgment for the

Jacobson family. See Brief of Appellants, 31-37. This is a confession of the Jacobsons' case.

Rather than respond to the Brief of Appellants, C.F.& I. has urged various propositions as factual, which are completely erroneous grossly misleading, and in several instances immaterial.

C.F.& I. opens its brief with an argument directed to a non-existent issue in this case, i.e., that the 270 K strand was not defective metallurgically and was not negligently manufactured. Since the Jacobson family has not based this appeal on either a metallurgical defect or negligent manufacture the argument is wholly irrelevant. Aside from that, the argument is largely one of semantics. Obviously 31,000 pound strand is defective per se if it breaks at 23,250 pounds. See Hanson vs Firestone Tire & Rubber Company, 276 F.2d 254 (6 Cir. 1960), and cases cited in Brief of Appellants, 53-54.

After that beginning C.F.& I. speculates from references to widely separated bits and pieces of the record that the failure of its 270 K strand could have been caused by mechanical damage from supreme chucks, or other factors. In the process C.F.& I. has taken considerable license with the record. None of its speculation will stand scrutiny.

On the subject of mechanical damage, C.F.& I.'s expert witness, Stephen Teleshak, acknowledged that failure of the strand so far below its minimum breaking strength cannot be accounted for on this ground. (Tr. 375-378, 397-398; see also Tr. 369-379)

After taking the nicks from the wedge grips into account there is a discrepancy in excess of 5,000 pounds.

The mechanical damage complained of is, of course, from wedge grips utilized in the normal employment of the strand. These are the standard wedge grips referred to in C.F.& I.'s literature, the grips in which the strand is intended to be used. (See Ex. 1) Therefore C.F.& I. is hardly in a position to complain of nicking from these wedge grips.

Be that as it may, Mr. Teleshak concluded in his original report prepared for C.F.& I. (Ex. 4) that the load carrying strength of the three nicked wires on the seven wire strand was reduced about 10%. (Tr. 369, 374) He later wrote a "supplemental" report after a series of correspondence with Mr. Preston of C.F.& I. In that report he stated that the overall load carrying strength of the entire strand was reduced 10% by the nicking. (Ex. 6; Tr. 364, 373)

According to Mr. Teleshak's first opinion, with the load carrying strength of the three nicked wires reduced 10%, the remaining strength of the strand should have been 29,175 pounds. (See Tr. 373-378.) If his "supplemental" conclusion is accepted the strand should have sustained a load of at least 27,900 pounds without failure. However, as pointed out previously, the strand didn't come close to carrying either load and when pressed Mr. Teleshak had to acknowledge that mechanical damage from nicking did not account for the failure. (Tr. 369-379, 397-402)

Another factor speculated upon by C.F.& I. is the matter of

eccentric loading. In urging this as a cause of failure C.F.& I. has inaccurately characterized the record. For instance, while C.F.& I.'s witness Teleshak did testify that misalignment, eccentricity or non-uniform loading, terms which he used synonomously, will cause premature failure, he also testified that in the equipment used by United Prestress such eccentricity was not possible. (Tr. 346.) Dr. Arthur Anderson also testified that the alignment would be "perfectly square, it could hardly be anything else. It had to be perfectly square". Further in regard to the possibility of misalignment, Dr. Anderson agreed with Mr. Teleshak that "this would be impossible". (Tr. 193, 194)

As to the influence of all of the various factors speculated about by C.F.& I., Dr. Anderson ran a series of tests reported in Exhibit 22. To confirm his conclusions, he subjected 270 K strand to the most extremely abusive conditions to which he could subject it. Using the most severe combination of factors C.F.& I. has speculated upon, Dr. Anderson could not induce a failure at a loading anywhere near the low load which broke the strand that killed DeRay Jacobson. C.F.& I.'s brief neglects to mention that, while it purports to argue from the testimony of Dr. Anderson.

Upon all the evidence,Mr. Teleshak, C.F.& I.'s metallurgical expert, concluded that the particular piece of strand in question was overloaded at 23,250 pounds, it simply was not strong enough to withstand that load. (Ex. 4, p. 6, Tr. 402)

Typical of C.F.& I.'s approach to this case, is the statement

at page 7 of its brief, transforming the following fork into a "homemade fork hammer". C.F.& I. then charges that the workman using this implement was hammering on the chuck where the failure occured. What the record actually contains concerning the function of this implement is the following:

> Q. It is necessary to follow along with this U shaped fork to keep those wedges where they belong.
>
> A. That is correct. (Tr. 97) (Mr. Knight)

Concerning the manner in which he used it, Mr. Etzwiler, the man who was employing this device at the time of Mr. Jacobson's death, said:

> A. Well, you can see it, this rod here, I just hold this rod here and the fork fits on top of the cullet here to keep those cullet jaws from getting out of position.
>
> Q. Do you move that cullet.
>
> A. No, then I just keep pushing movement on it. Once in awhile they'll stick and we have to tap it just to get it moving again, to loosen the cullet before the cullet bit into the strand, you know, in case it sticks a little bit, you have got to tap them to get them moving again.
>
> Q. You move it with that object.
>
> A. It just keeps going down with the movement of the ram. (Tr. 255)

The record is clear that the use of this device is to follow the middle chuck, hold it in place and keep its jaws lined up. (Tr. 97) No "hammering" of the strand or the chuck is involved. The chuck to which this instrument is applied is the middle chuck

within the steel spacer box, a point remote from the top chuck where the failure occured. (Ex. 23, Tr. 205) A glance at the picture, Ex. 23, will reveal that there is simply no room to hammer at the chuck inside the steel box, particularly when it is down within the leg of the single T. The assertion that Mr. Etzwiler was hammering is a gross misstatement of the record. But even if he could be said to be "hammering" - he was hammering on the wrong chuck, and at a place remote from the point of failure.

C.F.& I.'s brief continues with similarly transparent inaccuracies which are without record support, but extremely misleading. For example C.F.& I. criticizes the deflection technique, urging deflection should have been done in increments. This would minimize friction that can increase the load on the strand, but the experts took friction into account and made the worst possible friction assumptions against the Jacobson family in calculating the load at failure, 23,250 pounds. (Tr. 146-147) C.F.& I. urges that gauges should have been used to measure the force on the strand, but measurement of elongation, the system actually used, is the most accurate method of measuring force on the strand, and the method preferred by C.F.& I.'s H. Kent Preston, the developer of 270 K strand. (Ex. 11, p. 43) C.F.& I.'s charge that the crew worked without measurements is directly contrary to the testimony of Arthur Deshner, the man who actually used the measurements with DeRay Jacobson and helped him set up the casting bed. (Tr. 209, 210-214.) The charge that Jacobsons

failed to prove the chucks were lubricated is ludicrous. C.F.& I. tried to prove at trial that excessive lubricant in the chucks caused the failure. (See Tr. 53-54) Failing this C.F.& I. has done an about face. In any event, chucks are lubricated so they can be loosened after the strand is tensioned, and a dry chuck has less influence on load carrying strength than one that is lubricated. (Ex. 11, p. 34-35; Tr. 158, 190.)

C.F.& I.'s legal argument is based on the assumption that Floyd Swenson, the design engineer, must have known the limitations of 270 K strand because its bulletin refers to testing requirements of ASTM grade strand - a strand rated 15% weaker than 270 K. The argument springs from C.F.& I.'s reference to language in the "DUCTILITY" paragraph of PC 955 (Ex. 1), and a carefully edited quotation from the SPECIFICATION portion of the bulletin. In the process it has completely emasculated and distorted the bulletin. C.F.& I.'s quotation and supporting statement is as follows:

> Defendant's Bulletin states that its strand will develop 'a percentage of its ultimate strength' comparable to that of ASTM Grade in a casting bed. It further states under the heading SPECIFICATIONS that 'type 270 K strand shall be fabricated and tested in accordance with requirements of ASTM A 416-59T'. /Emphasis C.F.& I.'s./ Brief of Appellee,8.

Without C.F.& I.'s omission the SPECIFICATIONS paragraph reads:

> Type 270 K strand shall be fabricated and tested in accordance with the requirements of ASTM Designation A 416-59 T with the exceptions shown in Table #1, opposite. /Language omitted by C.F.& I. emphasized./ (Ex. 1.)

"Table #1," the exception, plainly states that 270 K 7/16 diameter strand has a "Breaking Strength of Strand," in minimum pounds, 31,000. Further, the bulletin is replete with superlatives extolling the greater strength and virtues of 270 K strand over the inferior ASTM Grade covered by "A416-59 T". Some examples:

> Type 270 K, 7-wire uncoated stress-relieved prestressed concrete strand, an important engineering breakthrough recently announced by C.F.& I.-Roebling, has approximately 15% greater strength than ASTM Grade strand. This quality together with its other inherent properties, imparts many distinct advantages to Type 270 K strand - - fewer strands to be handled . . . a larger prestressing force can be placed in a member. . .

With respect to DESIGN LOAD, that function which Floyd Swenson performed in connection with DeRay Jacobson's death, the bulletin provides:

> DESIGN LOAD
>
> Six Type 270 K strands will replace seven ASTM Grade strands of the same diameter.
>
> * * *
>
> COST COMPARISON
>
> * * *
>
> Under Design Load it was shown that six Type 270 K will replace seven ASTM Grade strands so we can use 12 Type 270 K in place of 14 ASTM Grade strands.
>
> * * *

For a complete discussion of PC 955 (Ex. 1) and its proper construction see Brief if Appellants, 57-64.

C.F.& I. attempts to demonstrate that Mr. Swenson in fact knew the limitations of 270 K strand, as now admitted by C.F.& I. by omitting significant portions of his testimony and citing questions about the lesser grade ASTM strand. His knowledge on that

subject has also been overstated by C.F.& I. (See Tr. 80-81.)

In fact, the only witness who claimed to know anything at all about ASTM testing procedures, was Mr. Teleshak, C.F.& I.'s expert metallurgical witness. Mr. Teleshak is the witness who did not know what a significant variation in strength of 270 K strand would be (Tr. 387), he could not read the stress strain diagram published by C.F.& I. to show the characteristics of 270 K strand (Tr. 394), he changed his opinion as to cause of failure after corresponding with C.F.& I. (Tr. 364, 369, 371-374), he could not account for over 5,000 pounds of strength loss in the piece of strand that killed Mr. Jacobson (Tr. 379, 398), he denied his own qualifications to speak on the subject of prestressed strand (Tr. 398-399), he couldn't test the strand at the place where it broke (Tr. 406), he didn't test in accordance with ASTM required procedures (Tr. 330-337), and he certified the test specimens to meet the wrong ASTM specification entirely - that for improved plow steel!! (Tr. 367-368). It is on the basis of that testing that C.F.& I. urges its 270 K strand met the irrelevant ASTM standard.

If we ignore the liberties C.F.&I. has taken with the wording of its bulletin, and assume its argument that the bulletin told the design engineer 270 K strand would hold 31,000 pounds less an allowance for mechanical damage from standard wedge grips employed in the casting bed, the knowledge imparted would be that the strand would hold approximately 28,000 or 29,000 pounds.

(Tr. 369-379, 397-402). This therefore was the value Floyd Swenson was entitled to assume, taking C.F.& I. at its word and accepting its present argument and construction of PC 955 (Ex. 1.) The strand in fact failed by more than 5,000 pounds to meet even this compromised standard. This is the same 5,000 pounds for which Mr. Teleshak was unable to account and which he ascribed to "overload". (Tr.). By designing only to 22,500 pounds Swenson left more than that large safety factor, even on the basis of the information, C.F.& I. now claims the bulletin gave to him.

In a nutshell, C.F.& I.'s argument is that the bulletin's reference to ASTM grade strand, and the ASTM testing requirements concerning the lesser grade strand, gave Swenson all of the warnings he needed to design in a sufficient safety factor when using 270 K strand. The fallacy of that argument is demonstrated by the Trial Court's Findings of Fact and Conclusions of Law;

/Finding/ XIV.

> The defendant knew that its 270 K strand would be used for hold-down devices although the strand was not furnished specifically for that use. The defendant knew that 270 K strand was employed under heavy tension in prestressing operations, and that strand failures are extremely hazardous. The defendant knew that a single strand of 270 K should not be used in hold-down devices where tensions of more than 15,500 pounds are developed. Defendant's literature did not adequately state the limitation of 270 K strand when used as a hold-down device. /Emphasis added/

(R.A. 231).

/Conclusion/ V.

> The defendant's literature did not contain adequate warnings as to the limitations of 270 K strand when used as a hold-down device . . .
>
> (R.A. 232.)

Since PC 955 (Ex. 1) did not give the design engineer, Floyd Swenson, adequate warnings of the limitations of 270 K strand - - "an important engineering breakthrough recently announced" - - where was he to get the knowledge C.F.& I. now assumes he had?

Contrary to the assumptions repeated in C.F.& I.s brief, it is clear from Mr. Swenson's testimony that he did not have the knowledge there ascribed to him. That testimony is fully set out at 23-26, Brief of Appellants. Without repeating his testimony here the transcript references are: 64-65, 79-80, 82-83, 85 and 86.

It is clear from both the trial court's finding (XIV) and Swenson's own testimony that he could not and did not have the knowledge now ascribed to him. Since C.F.& I.'s authorities depend for their application upon that knowledge erroneously assumed and ascribed to Swenson, they have no bearing on this appeal.

Error on the part of the trial court is expressly conceded at page 15 of C.F.& I.'s brief, where it acknowledges ". . . the design of the hold-down device was not faulty." The trial court based its denial of the post trial motions upon a contrary assumption. (R.A. 287). In this connection we invite the court's attention to Brief of Appellants, 28-29. It was Swenson's reliance on C.F.& I.'s overstated bulletin in designing and imposing the

load on the hold-down strands which brought about DeRay Jacobson's death.

In defense of its bulletin PC 955, C.F.& I. urges there are a variety of hold-down systems in use and it could not therefore be expected to deliver warnings of the limitations of 270 K strand. But C.F.& I.'s expert Mr. Janney testified that the system used at United Prestress was very common. (Tr. 428).

C.F.& I. claims it did all that it could toward warning by printing the abstract specifications of the strand. But, as we have noted, the trial court disagreed, finding the literature inadequate. (R.A. 231-232). It is worse than that. It grossly overstates the merits of the product, all the while purporting to provide "complete information" about 270 K strand - - "an important engineering breakthrough recently announced. . . ./with/ many distinct advantages." The falsity of C.F.& I.'s claims in this respect can be demonstrated by contrasting Exhibit 1 with Exhibit 2, a later publication,issued after the date of DeRay Jacobson's death. Exhibit 2 contains some warnings and replaced the earlier bulletin PC 955 (Ex. 1.) (Tr. 453.)

C.F.& I. also seeks to excuse its failure to warn by urging incompetence of its agents and representatives, an unthinkable defense and an admission of negligence.

To avoid liability for breach of warranty C.F.& I. assigns a peculiar meaning to the phrase "minimum ultimate strength" (utilizing the misleading quotation from PC 955 (Ex. 1) in the

process) but ignores entirely the even stronger and unambiguous phrase minimum Breaking Strength of Strand, 31,000 pounds, a statement for which it must be held accountable. Lane vs C.A. Swanson & Sons, 278 P. 2d 723, 726 (Cal. App. 1955). Further, as we have noted, even under C.F.& I.'s construction of PC 955, it states a warranty of approximately 28,000 or 29,000 pounds, i.e., minimum ultimate strength less allowance for mechanical damage. Even that compromised warranty was breached by failure of the strand under a load 5,000 pounds lower. See Hanson vs Firestone Tire & Rubber Co., 276 F. 2d 254 (6 Cir. 1960).

In connection with warranty C.F.& I. has tendered th e time honored defense of want of privity of contract, citing the 1958 decision of Larson vs U. S. Rubber, 163 F. Supp. 327 (D. Mont.) But that defense is dead in Montana. The question of "privity" was extensively briefed before the trial court on C.F.& I.'s motion to dismiss. In lieu of repeating those arguments we invite the court's attention to the briefs of the Jacobson family on the subject, which are set out in the record. (See R.A. 16-43; 153-156).

In Larson, absence of privity was declared to be legally insufficient as a defense to liability for negligence. As a defense in warranty cases it has been discredited by virtually every court to consider it since 1958. (See R.A. 16-43, supra). The Supreme Court of Montana has not approved the defense.

While this case was pending, the Supreme Court of Montana decided a case almost identical on its facts to Larson vs U.S.

Rubber, supra, and followed it without considering the current trend of the law. Counsel for the Jacobson family, and other attorneys, appeared before the Montana Supreme Court, on rehearing, amicus curiae. The facts of this case as they bear upon the privity defense, and the briefs and authorities appearing on this record, were submitted to the Supreme Court. As a result the court withdrew its former opinion and support of Larson vs. U.S. Rubber, supra, and deleted any suggestion that privity of contract is essential to an action based on warranties in Montana. The case was decided on other grounds. The only mention of privity is a statement in a concurring opinion by Justice John C. Harrison that privity should not be a shield in a breach of warranty action. Jangula vs United States Rubber Company. 147 Mont., 98, 410 P. 2d 462, 471, (1966).

For a statement of the merits of the privity issue and the overwhelming trend of modern authority against C.F.& I., the Jacobson family will rely upon the briefs in the record. (R.A. 16-43; 153-156). This court is fully conversant with the merits and trend of authority. Chapman vs Brown, 304 F. 2d 149 (9 Cir. 1963).

Montana is an enlightened state with new and modern rules of civil and criminal procedure, kept current and up to date by our Supreme Court. It has enacted the Uniform Commercial Code, a modern corporation code and other forward looking legislation. If the Montana Supreme Court will not sanction C.F.& I.'s outmoded

defense, the Jacobson family submits that this Court should not engraft the artificial "privity" requirement to the law of Montana. See Mason vs American Emery Wheel Works, 241 F. 2d 906, 910 (1 Cir. 1957).

CONCLUSION

Without denying the failure of its strand under a load far below its represented strength, C.F.& I. has distorted the record to speculate on various causes of failure. The record will not support these speculations, in fact it directly contradicts them.

Tacitly admitting the trial court relied on knowledge ascribed to the wrong man, C.F.& I. has built a case of assumptions to ascribe knowledge to Floyd Swenson, the design engineer involved in DeRay Jacobson's death. These assumptions are contradicted by the trial court's findings and the actual testimony of Mr. Swenson on the subject.

The compromised standard C.F.& I. now urges for its 270 K strand, through emasculation of the language of its bulletin, was also breached by the failure of the strand under a load several thousand pounds below that standard. Regardless of the standard imposed -- 31,000 pounds or that by which C.F.& I. would measure the strand -- the Jacobson family is entitled to recovery. As said the court in Mannsz vs MacWhyte Co., 155 F. 2d 445, 446 (3 Cir. 1946):

> If King was killed and Ellis was injured because the wire rope broke, having been subjected to less strain than that set forth in the table of

tensile strengths, the plaintiffs would be entitled to recover by way of breach of express warranty provided the wire rope was used by King for a purpose intended by MacWhyte.

Judgment should be reversed with instructions to the district court to determine damages and enter judgment for plaintiffs.

Respectfully submitted this 26th day of February, 1968.

CRESAP S. McCRACKEN
DOUGLAS C. ALLEN

BY: _____
Individually and for the firm of
CHURCH, HARRIS, JOHNSON & WILLIAMS
302 Great Falls National Bank Buildi
Great Falls, Montana 59401
Attorneys for Appellants.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____
DOUGLAS C. ALLEN - Attorney.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February, 1968, I served three (3) copies of the within and foregoing Brief of Appellants upon Joseph R. Marra, Esq., Attorney for Colorado Fuel and Iron Corporation, a corporation, Appellee, by delivering them to him personally at his office in Great Falls, Montana.

DOUGLAS C. ALLEN,
Individually and for the firm
CHURCH, HARRIS, JOHNSON & WILLIAMS
302 Great Falls National Bank Build
Great Falls, Montana 59401
Attorneys for Appellants.